

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

WAYNE BERRY,

Plaintiff,

vs.

DEUTSCHE BANK TRUST COMPANY  
AMERICAS (FKA BANKERS TRUST  
COMPANY) and JP MORGAN CHASE  
BANK in their separate capacities and as  
agents for the pre- and post-petition lenders of  
Fleming Companies, Inc.; GENERAL  
ELECTRIC CAPITAL CORPORATION;  
C&S WHOLESALE GROCERS, INC.; THE  
POST-CONFIRMATION TRUST OF  
FLEMING COMPANIES, INC.; ROBERT  
KORS; CORE-MARK HOLDINGS INC.  
AND DOES 1 TO 200,

Defendants.

Case No. 01:07 CV 7634 (WHP)

ECF Case

AFFIDAVIT OF ERIN N. BRADY IN SUPPORT OF DEFENDANTS  
POST CONFIRMATION TRUST'S AND ROBERT KORS' MOTION FOR  
SUMMARY JUDGMENT AND ALL DEFENDANTS' JOINT MOTION FOR SECURITY

KIRKLAND & ELLIS LLP  
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Counsel for Defendants Fleming Post Confirmation  
Trust, Robert Kors, Deutsche Bank Trust  
Companies Americas and JP Morgan Chase Bank

**AFFIDAVIT OF ERIN N. BRADY**

I, ERIN N. BRADY, testify as follows:

1. I am a partner at the law firm Kirkland & Ellis LLP. My firm has been retained to represent Defendants the Post-Confirmation Trust ("PCT") and Robert Kors in this lawsuit. I have personal knowledge of the facts set forth herein and, if called to testify, could and would testify competently thereto.

2. Attached as Exhibit A is a true and correct copy of relevant excerpts from Fleming Companies, Inc.'s Plan of Reorganization, which was approved by the Delaware Bankruptcy Court<sup>1</sup> on July 26, 2004, including the Amended Assumption Scheduled dated August 23, 2004.

3. Attached as Exhibit B is a true and correct copy of relevant excerpts from the transcript of an August 4, 2003 hearing in the Delaware Bankruptcy Court.

4. Attached as Exhibit C is a true and correct copy of relevant excerpts from the Order Affirming Magistrate Judge's Adoption of Discovery Master's Order Regarding F-1 Program Materials dated October 21, 2005 from the Second Fleming/Berry litigation.<sup>2</sup>

5. Attached as Exhibit D is a true and correct copy of relevant excerpts of the Summary Judgment Order dated June 27, 2005 from the Second Fleming/Berry litigation.

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<sup>1</sup> All references to the Delaware Bankruptcy Court refer to *In re Fleming Companies, et al.*, Case No 03-10945 (MFW), which Fleming filed in the Bankruptcy Court for the District of Delaware on April 1, 2003.

<sup>2</sup> All references to the Second Berry/Fleming litigation refer to *Wayne Berry v. Hawaiian Express Services, et al.*, Civ. No. CV 03-00385 SOM-LEK, which Berry filed in the District of Hawaii in July 2003.

6. Attached as Exhibit E is a true and correct copy of relevant excerpts from the Report of Special Master regarding attorneys' fees and costs dated December 4, 2006 from the Second Berry/Fleming litigation.

7. Attached as Exhibit F is a true and correct copy of relevant excerpts from the Report of Special Master regarding attorneys' fees and costs dated October 25, 2006 from the Second Berry/Fleming litigation.

8. Attached as Exhibit G is a true and correct copy the Order Affirming Magistrate Judge Order Compelling Wayne Berry to Comply with an Order for Judgment Debtor Examination dated August 10, 2007 from the Second Berry/Fleming litigation.

9. Attached as Exhibit H is a true and correct copy of relevant excerpts of the transcript of the Deposition of Wayne Berry dated August 13, 2007 from the Second Berry/Fleming litigation.

10. Attached as Exhibit I is a true and correct copy an IRS Notice of Federal Tax Lien dated January 11, 2000.

11. Attached as Exhibit J is a true and correct copy of Plaintiff Wayne Berry's Initial Disclosures in this matter dated January 15, 2008.

12. Attached as Exhibit K is a true and correct copy of relevant excerpts from the transcript of a January 23, 2007 hearing in the Delaware Bankruptcy Court.

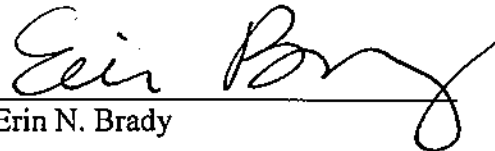
13. Attached as Exhibit L is a true and correct copy of a proof of claim filed by Wayne Berry in the Delaware Bankruptcy Court.

14. Attached as Exhibit M is a true and correct copy of relevant excerpts from the transcript of a July 26, 2004 hearing in the Delaware Bankruptcy Court.

15. Attached as Exhibit N is a true and correct copy of a December 24, 2004 letter sent by Wayne Berry to Craig Bichette of Fleming Companies, Inc., and forwarded to Kirkland & Ellis LLP.

16. Attached as Exhibit O is a true and correct copy of a the Post Confirmation Trust Agreements dated August 19, 2004.

So sworn under penalty of perjury under the laws of the United States of America in Los Angeles, California on February 26, 2008.

  
Erin N. Brady

**CALIFORNIA JURAT WITH AFFIANT STATEMENT**

- ☒ See Attached Document (Notary to cross out lines 1-6 below)  
☐ See Statement Below (Lines 1-5 to be completed only by document signer[s], *not* Notary)

1		
2		
3		
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6		

Signature of Document Signer No. 1 \_\_\_\_\_ Signature of Document Signer No. 2 (if any) \_\_\_\_\_

State of California

County of LOS ANGELES

Subscribed and sworn to (or affirmed) before me on this

26th day of FEBRUARY, 2008, by  
Date Month Year

(1) ERIN N. BRADY,  
Name of Signer

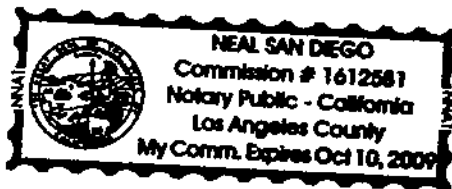
proved to me on the basis of satisfactory evidence  
to be the person who appeared before me (.) X

(and

(2) \_\_\_\_\_,  
Name of Signer

proved to me on the basis of satisfactory evidence  
to be the person who appeared before me.)

Signature \_\_\_\_\_

Signature of Notary Public

Place Notary Seal Above

**OPTIONAL**

*Though the information below is not required by law, it may prove  
valuable to persons relying on the document and could prevent  
fraudulent removal and reattachment of this form to another document.*

**Further Description of Any Attached Document**

Title or Type of Document: \_\_\_\_\_

Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

**RIGHT THUMBPRINT  
OF SIGNER #1**  
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**RIGHT THUMBPRINT  
OF SIGNER #2**  
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